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Admissibility of Improperly Obtained Data as Evidence in International Arbitration Proceedings

Brigitta John (MIDS Geneva) · Wednesday, September 28th, 2016

Can an international arbitral tribunal admit emails and documents as evidence if these documents were obtained by hacking a computer network? The ICSID tribunal in *Caratube International Oil Company and Mr Devincci Saleh Hourani v Kazakhstan* (ICSID Case No. ARB/13/13) held, "in principle Yes", in a decision which is not yet published but has been publicly reported. The Claimants in the arbitration sought to rely on 11 documents – including 4 documents covered arguably by lawyer-client privilege- out of the 60,000 documents that were published on a website after the Kazakhstan government's computer network was hacked. This was not the first time that a party sought to rely on documents obtained from a hacked computer network or stolen documents, in an international arbitration proceeding. In particular, documents obtained through *Wikileaks* have been relied on in previous arbitration proceedings. This article examines published decisions on this issue.

In *Methanex v. USA*, the Claimant trespassed into the office of the head of a lobbying organization and searched through internal trashcans and dumpsters. Through this "search", the Claimant obtained personal notes, private correspondence and material expressly subjected to legal professional privilege. The tribunal held that the documents were only of marginal evidential significance in support of Methanex's case and could not have influenced the result of the case. It however stated that the documents were obtained unlawfully and it would be wrong for Methanex to introduce evidential material obtained unlawfully. The Tribunal further held that the parties owed each other and the Tribunal a general duty to conduct themselves in good faith and to respect the equality of arms between them, the principles of equal treatment and procedural fairness imposed by the UNCITRAL Rules. It held that Methanex had violated this standard and had offended basic principles of justice and fairness.

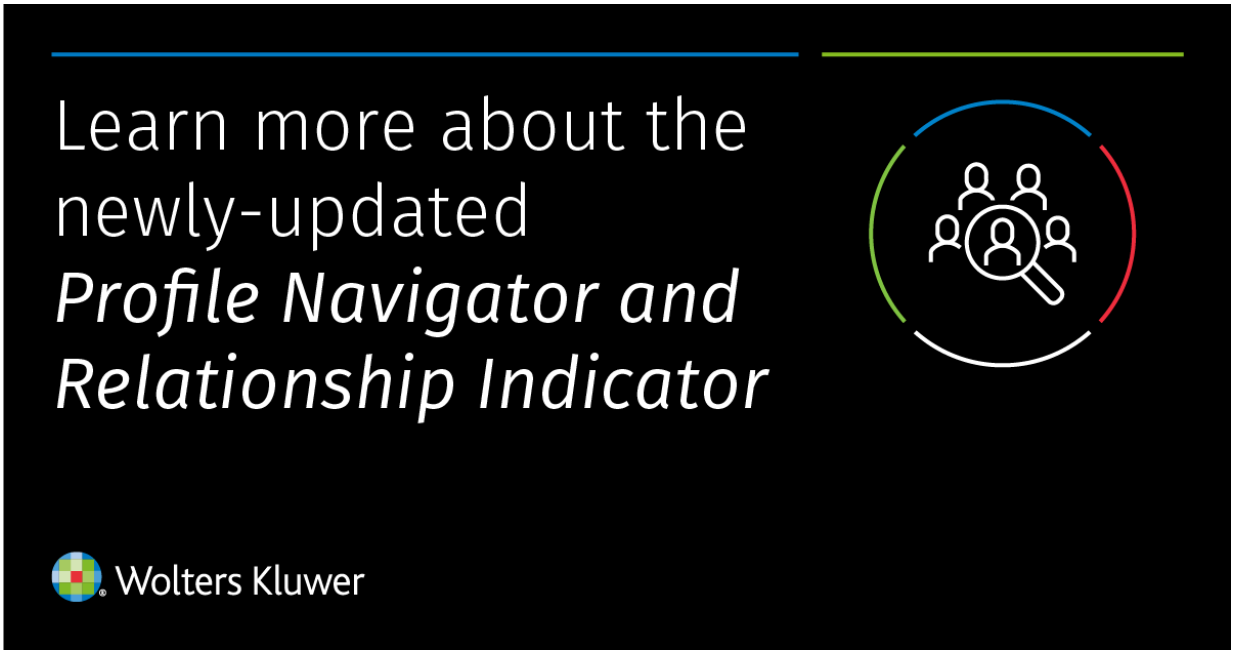
In *Libananco Holdings v Turkey* the Respondent – and not the Claimant – sought to rely on documents which had been obtained in a questionable manner. The Respondent, Turkey, had procured more than 2000 privileged and/ or confidential e-mails exchanged between the Claimant and its counsel through Court ordered intercepts. The Respondent claimed that the surveillance was directed at the investigation of certain money laundering activities and was unrelated to the present arbitration proceedings. The tribunal weighed the importance of confidentiality and legal privilege and the obligation of all parties to arbitrate fairly and in good faith and ordered the destruction and exclusion from evidence of all privileged and confidential communication.

In *ConocoPhilips v. Venezuela*, Venezuela sought to rely on US diplomatic cables obtained

through *Wikileaks*. Venezuela intended to substantiate its contention that it had in fact undertaken negotiations in good faith with the Claimant to determine the compensation payable for expropriation of the Claimant's assets. The case was special in that the Respondent presented the documents only after the Decision on the Merits had been rendered and the proceedings had entered the quantum phase. The Application was rejected by a majority decision of Judge Kenneth Keith and Mr. Yves Fortier, who held that it did not have the power to re-consider its Decision on Jurisdiction and Merits. However, Prof. Georges Abi-Saab published a strong dissent, wherein he stated that the *Wikileaks* cables presented glaring evidence and ignoring its existence and relevance would lead to a travesty of justice. The Respondent also filed an application to disqualify Justice Keith and Mr. Fortier as arbitrators in light of these developments, but that challenge was dismissed.

Wikileaks cables were also relied on in *Opic Karimum Corporation v Venezuela* and *K?l?ç v. Turkmenistan*. However, the tribunals did not discuss the admissibility of such documents as evidence because the tribunals held that the documents were not relevant. *Wikileaks* cables were also cited extensively by the arbitrators in their award in the *Yukos* arbitration. The cables revealed that Russian authorities had mounted pressure on the Claimants' auditors, PricewaterhouseCoopers, to withdraw its audits and testify against the Claimants' representatives. The Tribunal therefore concluded that Yukos was the object of a series of politically-motivated attacks by the Russian authorities that eventually led to its destruction. However, the Yukos tribunal did not address either the admissibility or authenticity of the cables.

The conclusion that can be drawn from the above is that nothing prevents a tribunal from admitting into evidence documents that may have been stolen or otherwise unlawfully obtained. However, tribunals will most likely refuse to admit such documents on the grounds of procedural fairness and equality of parties. As regards documents obtained from a public source such as *Wikileaks*, tribunals are guarded in their approach with respect to documents covered by attorney-client privilege, but as regards any other documents available in the public domain, a tribunal may be willing to admit such documents since ignoring them would lead to an unreasonable conclusion, which could make the award subject to challenge.



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